Supreme Court, U.S.
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No. 97-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PAUL A. BILZERIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 22, 1998

49pp

QUESTIONS PRESENTED

1. Whether the complete omission of an essential element of an offense is a structural error that defies harmless error analysis.

2. Whether a partial directed verdict with respect to an essential element of the offense is a structural error.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Paul A. Bilzerian, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit denying rehearing and denying the suggestion for rehearing en banc is unreported. It is reprinted in the appendix to the petition at A1-2. The opinion of the Second Circuit is reported at 127 F.3d 237 and is reprinted in the Appendix at A2-3. The unreported opinion of the District Court for the Southern District of New York is reprinted in the Appendix at pages A3-12.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 30, 1997. A timely motion for rehearing and suggestion for rehearing en banc was denied on February 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant constitutional and statutory provisions are the Fifth and Sixth Amendments to the United States Constitution and 18 U.S.C. § 1001, all of which are reprinted in the appendix to this petition at A4-34.

STATEMENT OF THE CASE

This case presents two extraordinarily important questions of crimnal law that have sevrely divided the circuit courts: (1) whether the complete omission of an essential element of an offense is a structural error that defies harmles error analysis; and (2) whether a partial directed verdict with respect to an essential element of the offense is a structural error.

* * * * * * * * * * *

On December 23, 1988, I was indicted in the Southern District of New York for violations of five counts of 18 U.S.C. § 1001 (false statements); two counts of 15 U.S.C. § 78j(b) (securities fraud) and two counts of 18 U.S.C. § 371 (conspiracy). Eight of the nine counts related to two Schedule 13D forms that I filed with the Securities and Exchange Commission (SEC) in connection with my purchase of securities of Hammermill Paper Company and Cluett, Peabody & Company. The remaining count alleged, among other things, a conspiracy to violate 18 U.S.C. § 1001 with respect to my purchase and sale of securities of Armco Steel and H.H. Robertson & Company.[1]

At trial, over my objection, but in accord with Second Circuit precedent at the time, the court instructed the jury that, with respect to the first clause of § 1001, materiality "is not a matter with which you are concerned, but, rather a legal question for the court to decide." The trial court then instructed the jury that the facts allegedly falsified, concealed or covered up, were material facts "as a matter of law."

With respect to the second clause of the 1001 Counts, the trial court, over my objection, but in accord with Second Circuit precedent at the time, omitted the element of materiality from the jury instructions. The trial court further instructed the jury that it could find me guilty if it determined that I violated either one of the two clauses of 18 U.S.C. § 1001.

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[1]The five § 1001 Counts and the one § 371 Count for conspiracy to violate § 1001 will be collectively referred to as "the 1001 Counts."

On June 9, 1989, I was convicted of all Counts and, on September 27, 1989, I was sentenced to serve four years in prison, followed by two years of probation, fined $1.5 million dollars and ordered to perform 250 hours of community service.[2]

On direct appeal, I raised the issues of whether materiality was an essential element of the offense under the second clause of § 1001, and whether the jury, rather than the trial judge, should have decided the element of materiality. The Second Circuit affirmed my conviction in all respects and my petition for a writ of certiorari was denied. United States v. Bilzerian, 926 F.2d 1285 (2d Cir.), cert. denied, 502 U.S. 813 (1991).

Some four years later, this Court addressed the issue of whether materiality should be decided by the jury in an 18 U.S.C. § 1001 case and held that the Fifth and Sixth Amendments require conviction by a jury of all elements of the crime. United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Shortly thereafter, the Second Circuit reversed itself and held that materiality is an element of the offense. United States v. Ali, 68 F.3d.1468, 1474-75 (2nd Cir.1995).

In 1995, I timely filed my first (and only) Motion To Vacate And Set Aside Judgment And Sentence Pursuant To 28 U.S.C. § 2255 (hereinafter my "2255 Motion"). I argued that, with respect to the § 1001 Counts, I had been denied my Fifth and Sixth Amendment right to have the jury decide the essential elements of the offense beyond a reasonable doubt. I further argued that Gaudin and Ali should be applied retroactively because they did not announce new rules, as defined by Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). I also argued that, even if Gaudin and Ali did announce new rules, omitting an essential element of the offense and directing a verdict on an essential element of the offense were structural errors that fit one of the two exceptions set forth in Teague. On September 13, 1996, the district court denied my 2255 Motion in all respects.

On September 30, 1997, the Second Circuit affirmed the judgment of the district court and held that Gaudin announced a "new rule" and that

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[2]On September 2, 1992, the prison portion of my sentence was reduced to twenty months. On February 13, 1995, I completed the terms of my sentence.

having the trial court decide the issue of materiality was not a structural error because "[t]here is little reason to believe that juries will have substantially different interpretations of materiality than judges." Bilzerian v. U.S., 127 F.3d 237, 241 (2nd Cir.1997). Consequently, the Court never addressed the merits of my Gaudin claim.

With respect to the omission of the essential element of materiality, the Second Circuit agreed that Ali should be applied retroactively. However, the court found that the error was not a structural error but, rather, was subject to harmless error review. Bilzerian v. U.S., 127 F.3d at 242. The Court then found the Ali error "harmless" because the "jury returned a special verdict form in each of the two counts of securities fraud specifically finding that the misrepresentations Bilzerian made were material." Ibid at 242. The Court reasoned that because the "underlying facts in the securities fraud counts are identical to the underlying facts in the § 1001 counts[,] [n]o rational juror could conclude, on the one hand, that the misrepresentations were material for two counts, but, on the other, those same representations were not material for other counts." Ibid at 242.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG TEN CIRCUIT COURTS WITH RESPECT TO WHETHER THE COMPLETE OMISSION OF AN ESSENTIAL ELEMENT OF THE OFFENSE IS A STRUCTURAL ERROR THAT DEFIES HARMLESS ERROR ANALYSIS.

The Second Circuit's decision in this case, that the omission of an essential element of the offense is not a structural error but, rather, is subject to harmless error review, is in accord with decisions of the Third, Ninth and Eleventh Circuit Courts. U.S. v. West Indies Transport, Inc., 127 F.3d 299, 318, fn.6 (3rd Cir.1997); Roy v. Gomez, 81 F.3d 863, 866-67 (9th Cir.1996)(en banc); U.S. v. Fern, 117 F.3d 1298, 1307 (11th Cir.1997).

However, the decision of the Second Circuit directly conflicts with decisions of six other Circuit Courts. U.S. v. David, 83 F.3d 638, 647 (4th Cir.1996)(omitting issue of materiality in § 1001 case fundamental error requiring reversal); U.S. v. Pettigrew, 77 F.3d 1500, 1511 (5th Cir.1996)(harmless error analysis is inapplicable where an essential element "was withheld from the jury"); Hoover v. Garfield Heights Mun. Court, 802 F.2d 168, 178 (6th Cir.1986)("failure to instruct the jury on an essential element of the crime charged is one of the exceptional constitutional errors to which the Chapman harmless error analysis does not apply"); Waldemer v. United States, 106 F.3d 729, 736, fn.3 (7th Cir.1996)(failure to submit element of offense to jury "transcends harmless error review"); U.S. v. Baumgardner, 85 F.3d 1305, 1309-10 (8th Cir.1996)(failing to submit element of offense to jury "cannot be treated as harmless"); United States v. Wiles, 102 F.3d 1043, 1060-61 (10th Cir.1996)(en banc)(complete omission of essential element of offense is structural error).[3]

The Circuit Courts are painfully aware of the conflict on the issue and have asked this Court for guidance. See U.S. v. Rogers, 94 F.3d 1519, 1529

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[3]Although the D.C. Circuit has not squarely addressed the issue, it would seem that it would agree that the error is structural and not subject to harmless error analysis. See U.S. v. Gaither, 440 F.2d 262, 264 (D.C.Cir.1971)("any omission of an element of a crime in the instructions is plain error").

fn.11 (11th Cir.1996)("further guidance and clarification would be extremely helpful"); Hennessy v. Goldsmith, 929 F.2d 511, 515 fn.2 (9th Cir.1991). Even members of this Court have argued that the issue is important and should be decided by this Court. Teel v. Tennessee, 498 U.S. 1007, 111 S.Ct. 571, 112 L.Ed.2d 577 (1990).

The First Circuit recently stated that:

> "In all events, our best guess is that the Supreme Court would regard an omitted element reversible error per se if there were a timely objection - although not automatically 'plain error' if no objection occurred..." U.S. v. Lopez, 71 F.3d 954, 960 (1st Cir.1995).

Our circuit courts should be given clear direction with respect to whether the complete omission of an essential element of an offense is a structural error or is amenable to harmless-error analysis. The issue is one of extraordinary importance and should be decided by this Court.

II. THE COURT SHOULD RESOLVE A CONFLICT AMONG SEVEN CIRCUIT COURTS WITH RESPECT TO WHETHER A PARTIAL DIRECTED VERDICT ON AN ESSENTIAL ELEMENT OF THE OFFENSE IS A STRUCTURAL ERROR.

The Second Circuit's decision in this case, that a partial directed verdict on an essential element of the offense is not a structural error, is in accord with decisions of the Eighth and Eleventh Circuit Courts. U.S. v. Raether, 82 F.3d 192, 194 (8th Cir.1996); U.S. v. DeCastro, 104 F.3d 1289, 1294-95 (11th Cir.1997).

However, the Second Circuit's decision directly conflicts with decisions of four other Circuit Courts. U.S. v. DeFries, 129 F.3d 1293, 1311-12 & fn.13 (D.C.Cir.1997)(partial directed verdict is, per se, a reversible error); U.S. v. DiRico, 78 F.3d 732, 737-38 (1st Cir.1996)(judge instructing jury that items were material "constituted a 'structural defect' in the trial process... which requires reversal."); U.S. v. Johnson, 71 F.3d 139, 144 (4th Cir.1995)(judge directing verdict on element of crime fundamental error not subject to harmless error analysis); U.S. v. Gaudin, 28 F.3d 943 (9th

Cir.1994)(en banc)(same).

In Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968), this Court found the right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice." In Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993), this Court stated that the "most important element" of this "fundamental right" is "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"

However, notwithstanding its importance to our American scheme of justice, this Court has recently acknowledged that the law is "by no means clear" with respect to whether a partial directed verdict on an essential element of an offense is structural error not amenable to harmless error analysis. Johnson v. U.S., 117 S.Ct. 1544, 1550 (1997). The split between seven circuit courts over this issue reflects the accuracy and the gravity of this Court's observation. This is an issue of extraordinary importance that should be decided by this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Paul A. Bilzerian
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Petitioner

Dated: May 22, 1998

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-fifth day of February one thousand nine hundred and ninety-eight.

PAUL A. BILZERIAN,

Plaintiff-Appellant

V. Docket No: 96-2920

UNITED STATES OF AMERICA,

Defendant-Appellee

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by the appellant Paul A. Bilzerian,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any judge that heard the appeal and that no such judge has requested a vote to be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Paul A. BILZERIAN, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

No. 1683, Docket 96-2920.
United States Court of Appeals,
Second Circuit.
Argued June 23, 1997.
Decided Sept. 30, 1997.

Paul A. Bilzerian, Pro se, Tampa, FL, for Plaintiff-Appellant.

Robert B. Buehler, Assistant United States Attorney for the Southern District of New York, New York City, for Defendant-Appellee.

Before: MESKILL, McLAUGHLIN, Circuit Judges, and LASKER, District Judge. (FN*)

McLAUGHLIN, Circuit Judge:

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York (Ward, J.) denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. We agree with the district court and, therefore, affirm.

BACKGROUND

During 1985 and 1986, Paul A. Bilzerian was involved in an ongoing pattern of fraudulent stock transactions. The transactions involved the stock of four companies: Cluett, Peabody and Company, Inc. ("Cluett"), Hammermill Paper Company ("Hammermill"), H.H. Robertson Company ("Robertson"), and Armco Steel ("Armco").

In general, Bilzerian concealed his ownership of stock in these companies either by "parking" or "accumulating" the stock at a registered bro-

ker-dealer. In so doing, Bilzerian sought to evade SEC disclosure requirements and to avoid tax liability. Bilzerian also engaged in other criminal activities such as submitting false documentation to the SEC, filing false tax returns with the IRS, and exchanging fraudulent invoices with his stockbroker to further his scheme.

In particular, the transactions that involved Cluett stock included misrepresenting the source of funds used to buy Cluett common stock, secretly accumulating the stock through a nominee, and misrepresenting the nature of the purchase to the SEC. On a Schedule (D) form filed with the SEC Bilzerian represented that the Cluett stock he owned was purchased with "personal funds," when in fact the funds were raised from other investors with whom Bilzerian had a profit-sharing and guarantee-against-loss agreement. Bilzerian also failed to reveal the accumulation of Cluett stock to the SEC as well as his intention to buy the company.

Similarly, the Hammermill transactions involved misrepresentations to the SEC about the source of funds Bilzerian used to buy the Hammermill stock and the secret accumulation of Hammermill stock through a broker.

As for the Robertson and Armco transactions, Bilzerian engaged in "stock parking" shares of the two companies. This means that Bilzerian "sold" his stock in Robertson and Armco to a broker who held it for 30 days with the understanding that Bilzerian would buy the stock back for the purchase price plus interest and commissions. By this device, the broker became the "owner" of the stock in name only and was under no market risk. Through this "stock parking" scheme, Bilzerian could claim a tax loss from the "sale" of the stock, while never giving up his ownership.

In June 1989, Bilzerian was indicted in the United States District Court for the Southern District of New York (Ward, J.) on two counts of securities fraud in violation of 15 U.S.C. § 78j(b), five counts of making false statements to the Securities and Exchange Commission (SEC) in violation of 18 U.S.C. § 1001, and two counts of conspiracy to commit specific offenses and to defraud the SEC and Internal Revenue Service (IRS) in violation of 18 U.S.C. § 371. The securities fraud and false statement counts were based on the Cluett and Hammermill transactions. The conspiracy counts involved the Armco and Robertson transactions.

When Bilzerian was tried, a conviction under 18 U.S.C. § 1001 could be sustained if a jury found the conduct at issue met the requirements of either 18 U.S.C. § 1001(a)(1) or (a)(2). At the time, the law in this Circuit was that, while materiality was an element of the offense for a conviction under 18 U.S.C. § 1001(a)(1), it was an issue to be decided by the judge as a matter of law. A conviction under 18 U.S.C. § 1001(a)(2), on the other hand, did not require any finding of materiality at all. Accordingly, the district judge made a finding of materiality, as a matter of law, with respect to 18 U.S.C. § 1001(a)(1) and did not instruct the jury that materiality was an element of an offense under 18 U.S.C. § 1001(a)(2).

The jury returned a verdict convicting Bilzerian of all the counts. The jury also completed a special verdict form for the securities fraud counts finding that all the components of securities fraud were proven beyond a reasonable doubt, including that Bilzerian made an untrue statement of material fact or omitted to state a material fact. We affirmed Bilzerian's conviction. *See United States v. Bilzerian,* 926 F.2d 1285 (2d Cir.1991).

In February 1995, Bilzerian filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 in the United States District Court for the Southern District of New York (Ward, J.) alleging that: (1) he was denied effective assistance of counsel; (2) the trial judge was biased and exhibited that bias during trial; (3) the jury instructions on reasonable doubt were deficient; (4) some of the counts of the indictment were multiplicitous; and (5) the conspiracy charges were invalid as a matter of law. Several months later, after the Supreme Court's decision in *United States v. Gaudin,* 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), and our decision in *United States v. Ali,* 68 F.3d 1468 (2d Cir.1995), Bilzerian moved to amend his habeas petition to allege that his conviction should also be set aside in light of these cases. *Gaudin* had held that if materiality is an element of the offense of making false statements under 18 U.S.C. § 1001(a)(1) or (a)(2), a finding of materiality must be made by the jury and not the judge. *Ali* had overruled our precedents and held that materiality is an element of the offense of making false statements under both § 1001(a)(1) and (a)(2). The district court granted Bilzerian's motion to amend. Bilzerian also filed a motion that Judge Ward recuse himself from deciding the habeas petition.

The District Court then denied Bilzerian's recusal motion and denied

his habeas petition without a hearing. Bilzerian now appeals, reasserting all the arguments he raised below.

DISCUSSION

Bilzerian raises several issues on appeal, only two of which warrant extended discussion — (a) whether his conviction under 18 U.S.C. § 1001 should be reversed because of the Supreme Court's decision in *United States v. Gaudin* and (b) whether Bilzerian's conviction under 18 U.S.C. § 1001 should be reversed in light of this Court's holding in *United States v. Ali*. Both questions involve whether the holdings of either case should be applied retroactively and even if so, whether the error is harmless. The remaining issues are resolved by a summary order filed herewith. *See Bilzerian v. United States*, 96-2920, 1997 WL 603470.

A. *United States v. Gaudin*

Bilzerian's central point is that his conviction under 18 U.S.C. § 1001 must be reversed under *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), which held that whether a fact is material under § 1001 is a jury question. Id. at 506, 115 S.Ct. at 2311-12. Before *Gaudin*, most circuits, including this one, had held that the materiality determination was to be made, as a matter of law, by the judge. *See United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.1984). *Gaudin* based its holding on the Fifth and Sixth Amendments' requirement that to convict a defendant a jury must make a finding on every element of the offense. *See Gaudin*, 515 U.S. at 522-24, 115 S.Ct. at 2320. Bilzerian contends that because his jury did not render a verdict on the element of materiality in the § 1001 counts, his conviction on those counts must be vacated.

While it is undisputed that the jury did not make a finding of materiality on the § 1001 counts, we must first determine, as a threshold matter, whether the *Gaudin* rule applies retroactively on collateral review. Under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), new rules of constitutional criminal procedure — as distinguished from new rules of criminal substantive law — are generally not applied retroactively on habeas review. A "new rule" is a rule that "breaks new ground or impos-

es a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070. A new rule announces a result that was not dictated by precedent at the time the petitioner's conviction became final. *Id.* A rule is a "new rule" unless "a ... court considering the petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution," *Gray v. Netherland*, 518 U.S. 152, ——, 116 S.Ct. 2074, 2083, 135 L.Ed.2d 457 (1996)(quoting *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260, 108 L.Ed.2d 415 (1990)).

Under this standard, *Gaudin* is a new rule. It was not dictated by precedent at the time Bilzerian's conviction became final. Prior to *Gaudin*, we had categorically held that materiality under § 1001(a)(1) was a question of law to be decided by the judge. *See Elkin*, 731 F.2d at 1009. Indeed, every federal appeals court, except the Ninth Circuit, had agreed with us. *Gaudin*, 515 U.S. at 526-27, 115 S.Ct. at 2322. A court in the Second Circuit, deciding the issue at the time of Bilzerian's trial, would certainly have felt compelled to follow the existing precedent in its circuit. Tellingly, every circuit court that has addressed the question whether *Gaudin* constitutes a new rule under *Teague* has held that it is. *See United States v. Shunk*, 113 F.3d 31 (5th Cir.1997); *United States v. Swindall*, 107 F.3d 831 (11th Cir.1997)(per curiam). We agree and now hold that *Gaudin* is a new rule for *Teague* purposes.

Bilzerian argues that *Gaudin* is not a "new rule" because it is based on the bedrock constitutional principle that a defendant has a right to have a jury make the ultimate determination of guilt as to each element of an offense. While the basis of the Supreme Court's holding in *Gaudin* may indeed involve well-established constitutional principles, this, of itself, does not compel the conclusion that *Gaudin's* holding is inexorably not a "new rule" under *Teague*. *See Graham v. Hoke*, 946 F.2d 982, 992-93 (2d Cir.1991). Because almost all constitutional decisions ultimately trace to some well-established constitutional principle, more is required to declare a rule not to be new. The extra ingredient is that the constitutional decision comes, not as a sunburst, but as an obvious extension of constitutional principles that were well-established at the time the defendant's conviction became final. *See id.* at 992. As discussed above, Bilzerian fails to establish that *Gaudin* was a simple corollary to well-established constitutional principles. This is appar-

ent when all but one federal circuit court of appeals concluded that *Gaudin* was not dictated by established constitutional principles.

Bilzerian contends in the alternative that, even if *Gaudin* announces a "new rule" for *Teague* purposes, the *Gaudin* holding falls into one of the *Teague* exceptions. *Teague* recognizes two exceptions to the general rule that new rules of constitutional procedure are not retroactive on collateral review: (1) new rules which "place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense;" and (2) "new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith,* 497 U.S. 227, 241-42, 110 S.Ct. 2822, 2831, 111 L.Ed.2d 193 (1990). Bilzerian concedes that the first exception is inapplicable, but he urges that *Gaudin* fits into the second exception because the right to have a jury decide guilt or innocence is the most important element of a criminal trial. He claims support for his argument in the Declaration of Independence, Blackstone's writings and various Supreme Court opinions.

Bilzerian, however, exaggerates the reach of the second *Teague* exception. That a jury determination of guilt or innocence is an important element of a criminal trial does not necessarily mean that *Gaudin* is a "watershed rule" of criminal procedure. Watershed rules "alter our understanding of the bedrock procedural elements" essential to the fairness of a trial. *Teague,* 489 U.S. at 311, 109 S.Ct. at 1076 (quoting *Mackey v. United States,* 401 U.S. 667, 693, 91 S.Ct. 1171, 1180, 28 L.Ed.2d 388 (1971)). The Supreme Court has pointed to the rule announced in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)(the 6th Amendment right to counsel applies to the states) as an example of a watershed rule. *See Saffle,* 494 U.S. at 495, 110 S.Ct. at 1263-64. The rule in *Gaudin* merely shifts the determination of materiality from the judge to the jury. This shifting does not "alter our understanding of the bedrock procedural elements" essential to the fairness of a trial. *Teague,* 489 U.S. at 311, 109 S.Ct. at 1076. There is little reason to believe that juries will have substantially different interpretations of materiality than judges and therefore, practically speaking, *Gaudin* will do little to alter the status quo. Bilzerian's argument that the *Gaudin* rule should be applied retroactively must fail; and because we find that *Gaudin* does not apply retroactively, we

see no reason to reach the merits of Bilzerian's additional arguments on this issue.

B. *United States v. Ali*

At the time of Bilzerian's conviction, 18 U.S.C. § 1001(a)(2) punished anyone who "makes any false, fictitious or fraudulent statements or representations" within the jurisdiction of any department or agency of the United States. When Bilzerian was tried, the law of this Circuit did not require any finding of materiality for a conviction under § 1001(a)(2). *See Elkin,* 731 F.2d at 1009.

In 1995, in response to the Supreme Court's decision in *United States v. Gaudin,* 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), we held in *United States v. Ali,* 68 F.3d 1468 (2d Cir.1995) that materiality was as much an element of an offense under § 1001(a)(2) as under 1001(a)(1). Bilzerian argues that his convictions under § 1001 should be overturned in light of *Ali.* Once again, we first address whether the decision applies retroactively on collateral review. While we have applied *Ali* retroactively on direct review, see *United States v. Ballistrea,* 101 F.3d 827, 834 (2d Cir.1996), we have yet to address the retroactivity question on collateral review. Because the rule announced in *Ali* is substantive rather than procedural, the analysis set forth in *Teague v. Lane* does not apply. *See Ianniello v. United States,* 10 F.3d 59, 63 (2d Cir.1993). When new substantive rules are announced, there is a presumption that they will be applied retroactively. *See Ingber v. Enzor,* 841 F.2d 450, 453-54 (2d Cir.1988).

Courts have repeatedly held that a substantive change in the law resulting in the possibility that a person might have been convicted for conduct that is not illegal is properly applied retroactively on collateral review. *See Ianniello,* 10 F.3d at 63; *Ingber,* 841 F.2d at 454-55; *United States v. Shelton,* 848 F.2d 1485, 1489 (10th Cir.1988). These holdings rest on the Supreme Court's holding in *Davis v. United States,* 417 U.S. 333, 346-47, 94 S.Ct. 2298, 2305-06, 41 L.Ed.2d 109 (1974) that a defendant suffers a fundamental wrong when punished for conduct that simply is not illegal. We conclude that *United States v. Ali* redefined § 1001(a)(2) to legalize certain conduct previously thought to be criminal. Consequently, Ali should be applied retroactively on collateral review.

Although we agree with Bilzerian that *United States v. Ali* is retroactively applicable on collateral review, we nevertheless affirm the dismissal of Bilzerian's § 2255 petition, because the error here is harmless. Bilzerian suggests that the district court's failure to instruct the jury on materiality as an element of an offense under section 1001(a)(2) is not subject to harmless error analysis and should result in automatic reversal. We disagree.

Most constitutional errors are amenable to harmless error analysis. *See Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 2081-82, 124 L.Ed.2d 182 (1993). The Supreme Court itself has applied a harmless error analysis to a wide range of errors. *See Arizona v. Fulminante,* 499 U.S. 279, 306, 111 S.Ct. 1246, 1262-63, 113 L.Ed.2d 302 (1991). We too have held that improper jury instructions resulting in the possibility that a defendant was convicted of conduct that is not illegal gets a harmless error review. *Ianniello,* 10 F.3d at 62-63. In *Ianniello* we noted that "[h]armless error analysis is the rule rather than the exception, and [a] court may constitutionally play a guarded role in judging whether facts found by a jury are so conclusive on an ultimate factual issue — an issue undecided by the jury because of a faulty charge — that the error in the charge and resultant absence of an actual injury finding on the ultimate issue are harmless." *Id.* at 64 (quoting *Pope v. Illinois,* 481 U.S. 497, 501-04, 107 S.Ct. 1918, 1921-23, 95 L.Ed.2d 439 (1987).)

The failure to include materiality as an element of an offense under § 1001(a)(2) was harmless here because the evidence overwhelmingly demonstrated that Bilzerian would have been convicted even if the jury had been given the issue of materiality. The jury returned a special verdict form in each of the two counts of securities fraud specifically finding that the misrepresentations Bilzerian made were material. The underlying facts in the securities fraud counts are identical to the underlying facts in the § 1001 counts. No rational juror could conclude, on the one hand, that the misrepresentations were material for two counts, but, on the other, those same misrepresentations were not material for other counts. *See Ianniello,* 10 F.3d at 65.

CONCLUSION

We have considered Bilzerian's additional arguments and find them to be meritless in a summary order filed herewith. The judgment of the district court is AFFIRMED.

FN* The Honorable Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Paul A. BILZERIAN, Petitioner,

v.

UNITED STATES of America, Respondent.

Nos. 95 Civ. 1215 RJW, 88 Cr. 962 RJW.

United States District Court, S.D. New York.

Sept. 13, 1996.

MEMORANDUM DECISION

ROBERT J. WARD, District Judge.

Petitioner Paul A. Bilzerian ("Bilzerian") moves pursuant to 28 U.S.C. § 2255 for an order of this Court vacating his sentence and setting aside his judgment of conviction. Petitioner has also filed two separate motions supplementing this § 2255 petition. First, Bilzerian asks this Court to grant him leave to amend his original § 2255 motion to include an additional ground for relief or, in the alternative, to treat the motion to amend as a motion for a writ of error coram nobis. Second, petitioner moves for an order granting him discovery. Additionally, the Court will also address petitioner's most recent motion which seeks partial summary judgment.

For the reasons hereinafter stated, petitioner's motion for leave to amend is granted and the Court hereby deems his pending § 2255 petition as amended to include the additional ground for relief. Petitioner's underlying § 2255 motion, as amended, is in all respects denied and the petition is dismissed. Likewise, Bilzerian's recent motion for partial summary judgment is denied. Finally, Bilzerian's motion for discovery is denied as moot.

BACKGROUND

During 1985 and 1986, Bilzerian was involved in an ongoing pattern of fraudulent stock transactions involving four companies. Petitioner concealed his ownership of stock in these companies by either "parking" or "accumulating" stock at Jefferies & Company, Inc. ("Jefferies"), a registered broker-dealer. In so doing, petitioner sought to evade SEC disclosure requirements and to avoid tax liability. Petitioner engaged in criminal activities such as submitting false documents to the SEC, filing false tax returns with the IRS, and exchanging fraudulent invoices with his stockbroker in furtherance of his scheme. On June 9, 1989, after a six-week trial, a jury convicted Bilzerian on nine counts of an indictment which charged various violations of the securities laws.

This Court, on September 29, 1989, sentenced petitioner to a four-year term of imprisonment, a $1,500,000 fine, and a two-year period of probation with a condition of 250 hours of community service. The Second Circuit subsequently affirmed Bilzerian's conviction. See United States v. Bilzerian, 926 F.2d 1285 (2d Cir.), cert. denied, 112 S.Ct. 63 (1991). On September 2, 1992, the Court reduced petitioner's custodial sentence to twenty months. Despite having served his full prison sentence, paid his fine, and satisfied the conditions of his probation, petitioner has moved pursuant to 28 U.S.C. § 2255 for an order vacating his sentence and setting aside the judgment of conviction.

In his original motion, filed on February 21, 1995, Bilzerian relies on five grounds in support of his § 2255 motion. First, petitioner claims that he was denied effective assistance of counsel in that his attorney failed to argue selective prosecution, improperly cross-examined a government witness, failed to assert an effective defense, failed to object to numerous instances of alleged prosecutorial misconduct, failed to object to the admissibility of certain evidence, failed to object to expert witness testimony, and failed to ask the Court to resolve sentencing issues. Second, petitioner alleges judicial misconduct and bias in support of his § 2255 motion. Third, Bilzerian challenges as deficient this Court's instructions to the jury on the reasonable doubt standard. Fourth, petitioner argues that his convictions on Counts 2, 3, 6, and 7 were multiplicitous. Finally, Bilzerian asserts that Counts 8 and 9, the conspiracy charges, do not state an offense as a matter of law.

On August 11, 1995, petitioner moved to amend his original § 2255 motion to add an additional ground for relief. Bilzerian argues that his conviction should be set aside in light of the Supreme Court's recent decision in United States v. Gaudin, 115 S.Ct. 2310 (1995). In the alternative, Bilzerian asks this Court to treat his motion to amend as an application for a writ of error coram nobis. On September 14, 1995, petitioner filed yet another supplemental motion seeking discovery. Finally, on July 10, 1996, Bilzerian filed what he designated as a motion for partial summary judgment asking this Court to vacate his conviction.

DISCUSSION

This Court first will address Bilzerian's recent motion to amend and then will reach the merits of petitioner's underlying § 2255 motion. Next, the Court will consider Bilzerian's motion for partial summary judgment. Lastly, the Court will address petitioner's motion for discovery.

I. Motion to Amend

Petitioner relies on Rule 15(a), Fed.R.Civ.P., in support of his motion to amend his § 2255 petition to include a claim in light of the Supreme Court's recent decision in United States v. Gaudin, 115 S.Ct. 2310 (1995). The Gaudin claim was unavailable to Bilzerian as of the date of his § 2255 motion since the Court only decided Gaudin on June 19, 1995, just over four months after petitioner's original filing. The government opposes the instant motion on the grounds that Bilzerian was not "in custody" as required by § 2255 on the date that he filed his petition to amend. The government argues that Bilzerian cannot rely on Gaudin in connection with his § 2255 petition because he failed to meet the jurisdictional "in custody" requirement and asks this Court to treat the instant motion as an application for a writ of error coram nobis.

When deciding matters pertaining to § 2255 motions, this Court must first look to The Rules Governing Section 2255 Proceedings in the United States District Courts ("§ 2255 Rules"). Although those rules do not specifically address motions to amend § 2255 petitions, Rule 12 states:

If no procedure is specifically prescribed by these rules, the district

court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

It is therefore within the discretion of this Court to apply the Federal Rules of Civil Procedure to the instant motion.

Rule 15(a), Fed.R.Civ.P., provides, in pertinent part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.... Otherwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Although that rule governs amendments to pleadings and does not specifically pertain to amendments to pending motions, Rule 12 of the § 2255 Rules gives this Court the discretion to apply Rule 15(a) to the instant case. At least one other court in this district has applied Rule 15(a) to allow a petitioner to amend his § 2255 petition to assert additional claims. See Nunez v. United States, 892 F.Supp. 528, 531 (S.D.N.Y.1995). Because Rule 15(a) provides that "leave [to amend] shall be freely given when justice so requires," this Court finds that it is in the interest of justice to allow Bilzerian to amend his § 2255 motion to include his Gaudin claim.

The government argues that, under Scanio v. United States, 37 F.3d 858 (2d Cir.1994), the Court should bar Bilzerian from raising his Gaudin claim because he was not in custody at the time he filed the instant motion to amend. In Scanio, the Second Circuit held that the petitioner failed to meet the jurisdictional "in custody" requirement and barred him from filing his § 2255 motion three days after his term of supervised release expired. See id. Indeed, it is well established that a petitioner must meet the jurisdictional "in custody" requirement to be eligible to file for § 2255 review. See id. at 860; United States v. Brilliant, 274 F.2d 618, 620 (2d Cir.), cert. denied, 363 U.S. 806 (1960). Persons under supervised release or on probation are deemed to be "in custody" for this purpose. See Scanio, 37 F.3d at 860; United States v. Re, 372 F.2d 641, 643 (2d Cir.), cert. denied, 388 U.S. 912 (1967).

The Scanio case, however, is inapposite. Here, the government does not dispute that Bilzerian initially satisfied the jurisdictional requirement of § 2255, albeit barely, by filing his original motion on February 10, 1995, exactly one day before his term of probation expired. Bilzerian now seeks merely to amend his timely filed motion and, under Rule 15(c), Fed.R.Civ.P., any such amendment would relate back to the date of his original filing. [FN1] Rule 15(c) provides, in pertinent part:

FN1. Whether petitioner raises a valid Gaudin claim is a separate matter to be decided on its merits and does not alter the applicability of Rule 15(c), Fed.R.Civ.P., or affect the relation back of this amendment.

An amendment of a pleading relates back to the date of the original pleading when ... (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading....

Since petitioner has fully briefed the merits of his Gaudin claim in his motion to amend and since the government likewise has addressed the merits of the claim in its opposition papers, this Court hereby deems the original motion pursuant to § 2255 to be amended to include Bilzerian's new claim for relief.

II. 2255 Motion

Petitioner brings the instant motion pursuant to 28 U.S.C. § 2255 which provides, in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, ... may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A petitioner can rely on § 2255 only to correct a defect in sentencing which raises constitutional, jurisdictional, or other fundamental issues. See United States v. Addonizio, 442 U.S. 178, 185 (1979). Likewise, a court can employ § 2255 only to remedy an error in sentencing "which inherent-

ly results in a complete miscarriage of justice." United States v. Wright, 524 F.2d 1100, 1101 (2d Cir.1975).

As a general rule, a petitioner is barred from raising a claim in a § 2255 proceeding that was not litigated on direct appeal absent a showing of cause for the procedural default and actual prejudice resulting therefrom. See United States v. Frady, 456 U.S. 152, 167-68 (1982); Campino v. United States, 968 F.2d 187, 190 (2d Cir.1992). Further, it is well settled in the Second Circuit that a petitioner may not use a § 2255 proceeding to relitigate issues that were raised and considered on direct appeal. See United States v. Jones, 918 F.2d 9, 10-11 (2d Cir.1990); Barton v. United States, 791 F.2d 265, 267 (2d Cir.1986); Giacalone v. United States, 739 F.2d 40, 42 (2d Cir.1984).

A. Ineffective Assistance of Counsel

As his first ground for § 2255 relief, Bilzerian raises a claim of ineffective assistance of counsel. In support of his motion, petitioner alleges that his attorney failed to argue selective prosecution, improperly cross-examined a government witness, failed to assert an effective defense, failed to object to numerous instances of alleged prosecutorial misconduct, failed to object to the admissibility of certain evidence, failed to object to expert witness testimony, and failed to ask the Court to resolve sentencing issues.

Although Bilzerian did not argue that his trial counsel was ineffective on direct appeal, he nevertheless may pursue this claim in the instant § 2255 motion. As noted above, a petitioner is barred from raising a claim in a § 2255 proceeding that was not litigated on direct appeal absent a showing of cause for the procedural default and actual prejudice resulting therefrom. See United States v. Frady, 456 U.S. 152, 167-68 (1982); Campino v. United States, 968 F.2d 187, 190 (2d Cir.1992). The Second Circuit, however, has held that a petitioner may collaterally attack his or her conviction and sentence on ineffective assistance grounds even if that claim was not raised on direct appeal unless that petitioner was represented by new appellate counsel and the ineffective assistance claim was based solely on the record developed at trial. See Billy-Eko v. United States, 8 F.3d 111 (2d Cir.1993); see also Riascos-Prado v. United States, 66 F.3d 30, 34-35 (2d Cir.1995); Douglas v. United States, 13 F.3d 43, 47 (2d Cir.1993). Since

petitioner's trial counsel acted as appellate co-counsel with Professor Charles Fried of the Harvard Law School, petitioner is entitled to pursue his ineffective assistance claim in the instant motion. The Court, therefore, will address each of these claims in light of the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984).

1. Legal Standard

The Supreme Court has articulated a two-pronged test to evaluate claims of ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984). Under the first prong of the Strickland test, Bilzerian must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." Strickland, 466 U.S. at 687. This prong is not satisfied unless the Court is persuaded that an attorney's actions were objectively unreasonable. To evaluate counsel's effectiveness, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. The Court is bound to apply this standard "in light of all the circumstances [in the case]." Id. at 690.

It is well established, however, that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Indeed, this Court must give counsel "wide latitude ... in making tactical decisions" and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. at 689. According to the Strickland Court, therefore, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690.

If petitioner meets the first prong of the Strickland test, he then must establish "that the deficient performance [of counsel] prejudiced the defense." Id. The second prong of the Strickland test demands that petitioner affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. To make this determination, the Court "must consider the totality of the evidence before the judge or jury." Id. at 695.

2. Bilzerian's Claim

Bilzerian relies upon seven grounds in support of his argument that his trial counsel was ineffective. Upon examination, however, all of petitioner's claims are meritless. As an initial matter, Bilzerian has failed in each case to satisfy the first prong of the Strickland test in that he has not alleged any unreasonable conduct on the part of his attorney. Indeed, all of the acts of counsel upon which petitioner bases his claim of ineffective assistance can be characterized as sound trial strategy. Further, even if counsel's actions could be interpreted to fall outside the scope of professional norms, Bilzerian has also failed in each case to satisfy the second prong of the Strickland test in that he has not established a reasonable likelihood of prejudice.

a. Failure to Argue Selective Prosecution

In his memorandum of law, petitioner first contends that his counsel was deficient in failing to argue that Bilzerian was the object of a selective prosecution. A claim of selective prosecution requires the defendant to meet the stringent two-part test set forth in United States v. Berrios, 501 F.2d 1207 (2d Cir.1974). Under Berrios, Bilzerian would have had to establish that he had been singled out for prosecution while others similarly situated have not faced the same charges and that the prosecution was brought in bad faith. See id. at 1211; see also United States v. Fares, 978 F.2d 52, 59 (2d Cir.1992).

Whether to pursue a claim of selective prosecution, however, is a decision that falls squarely within the purview of counsel. Bilzerian offers no evidence to suggest that his attorney failed to consider the merits of a selective prosecution claim. Rather, it appears that counsel decided, as a matter of sound trial strategy, not to pursue the issue. Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable...." Strickland, 466 U.S. at 690. Further, even if counsel's decision to forego a claim of selective prosecution was unreasonable, petitioner offers no evidence to suggest that this decision prejudiced him such that there exists a reasonable likelihood that the outcome of his trial would have been different. For these reasons, Bilzerian's claim of ineffective assistance based on his attorney's failure to pursue a selective prosecution claim must fail.

b. Improper Cross-Examination

Petitioner next alleges that his trial counsel was ineffective in the manner in which he conducted the cross-examination of Brian Murphy ("Murphy"), an accountant who prepared tax returns for several of the partnerships involved in a transaction that formed the basis of several of the charges against Bilzerian (the "Hammermill transaction"). In his memorandum of law in support of his motion, petitioner alleges that, on cross-examination, counsel improperly opened the door to testimony regarding the accuracy of certain tax returns. Bilzerian argues that this testimony proved "devastatingly prejudicial to [his] case" after the government was allowed to conduct re- direct examination of the witness. On redirect, the government established that Murphy had done work in connection with Bilzerian's 1986 personal income tax return wherein petitioner had failed to report four million dollars in income from the Hammermill transaction.

The scope and manner of examination of witnesses is rarely a valid basis for a claim of ineffective assistance of counsel. See United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir.), cert. denied, 484 U.S. 958 (1987); see also United States v. Eisen, 974 F.2d 246, 265 (2d Cir.1992), cert. denied, 507 U.S. 1029 (1993); United States v. Garguilo, 324 F.2d 795, 797 (2d Cir.1963). Indeed, it is well established in this Circuit that "[d]ecisions whether to engage in cross-examination and, if so to what extent and in what manner, are ... strategic in nature." Nersesian, 824 F.2d at 1321. An examination of the record reveals that counsel undertook this line of questioning in an effort to rebut misleading inferences raised during direct examination. Even Bilzerian concedes that counsel's cross-examination of Murphy "was intended to serve several legitimate purposes." Verified Memorandum of Fact and Law in Support of Paul A. Bilzerian's Motion Under 28 USC § 2255 to Vacate and Set Aside Judgment and Sentence, at 38 [hereinafter Bilzerian Memo]. That counsel went too far or took a risk in pursuing a line of questioning which opened the door to further examination by the government on a point that Bilzerian would rather have kept from the jury does not support a finding that counsel acted unreasonably or outside the scope of professional norms.

Finally, there is no evidence to suggest that the testimony brought out on re- direct examination created a reasonable likelihood of prejudice.

Indeed, as suggested by the Second Circuit when affirming his conviction, "[w]hen Bilzerian took the stand, he was cross-examined about his personal tax returns and was able to provide an exculpatory explanation of pertinent events that blunted the impact of the redirect examination of Murphy." United States v. Bilzerian, 926 F.2d 1285 (2d Cir.1991), cert. denied, 502 U.S. 813 (1991). For these reasons, Bilzerian's claim of ineffective assistance of counsel based on the cross-examination of Murphy is without merit.

c. Failure to Assert an Effective Defense

Bilzerian also challenges as ineffective counsel's decision to put forth a good faith defense to the charges against petitioner. When considering Bilzerian's decision to testify, this Court found that petitioner could not speak regarding his good faith attempt to comply with the securities laws without waiving his attorney-client privilege. Petitioner now contends that, because his attorney misunderstood the scope of this Court's decision and persisted in putting forth a good faith defense, he was unable to argue that he lacked the requisite specific intent to make false statements to the government. To that end, Bilzerian suggests that his attorney's "misunderstanding ... of the law on an essential element of the offense denied [him his] constitutional right to deny the charges against [him] and present a valid defense." Bilzerian Memo, at 45. Indeed, petitioner suggests that his attorney's defense strategy left him "in the untenable [position] of taking the witness stand with nothing to say." Id.

Again, petitioner's ineffective assistance claim is based on conduct that falls well within defense counsel's province. Whether a defendant should testify on a matter which would likely result in the waiver of the attorney- client privilege is a decision which this Court should not second-guess absent evidence that such a choice of trial strategy was unreasonable. As the Supreme Court has noted, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. In the instant case, Bilzerian offers no evidence that counsel acted outside professional norms in pursuing a good faith defense and thus fails to satisfy the first prong of the Strickland test.

Additionally, Bilzerian fails to establish a probability that the outcome of his trial was jeopardized by his inability to testify to his alleged lack of required criminal intent. Indeed, it appears that Bilzerian would have faced the same conundrum with respect to his attorney-client privilege whether he raised a good faith defense or argued his lack of criminal intent because, in either situation, he would have placed his state of mind at issue. For these reasons, Bilzerian fails to raise a viable claim of ineffective assistance based on counsel's decision to put forth a good faith defense.

d. Failure to Object to Prosecutorial Misconduct

As a fourth ground in support of his claim of ineffective assistance, petitioner alleges that his counsel failed to object to numerous instances of alleged prosecutorial misconduct. Given the wide latitude accorded counsel under Strickland, Bilzerian must show that the government's conduct satisfied the standard for prosecutorial misconduct in order to establish counsel's failure to object as unreasonable. In essence, if there is no merit to the underlying charge of prosecutorial misconduct, an attorney is not ineffective for his or her failure to object on such grounds. See, e.g., Grant v. Scully, No. 90 Civ. 4429, 1993 WL 88207, at *5 (S.D.N.Y. Mar. 19, 1993); Savage v. Berbary, No. CIV-90-290E, 1991 WL 147371, at *3 (W.D.N.Y. July 22, 1991).

To evaluate alleged prosecutorial misconduct, this Court may look to "(1) the severity of the alleged misconduct; (2) the curative measures taken; and (3) the likelihood of conviction absent any misconduct." United States v. Locasio, 6 F.3d 924, 945-46 (2d Cir.1993), cert. denied, 114 S.Ct. 1646 (1994). Petitioner thus "face[s] a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of [his] right to a fair trial." Id. at 945. Bilzerian raises five alleged instances of prosecutorial misconduct and suggests that his attorney was ineffective in his failure to object to any of them.

i. Opening Statement

First, petitioner argues that the government's opening statement was unduly argumentative. Specifically, Bilzerian summarily asserts that numerous words, such as referring to petitioner as a liar, and statements,

such as referring to the parking arrangement as a fraud on the IRS, used by the government in its opening statement were argumentative and resulted in prejudice to him at the beginning of trial. For the government's conduct during the opening statement to constitute misconduct, however, Bilzerian must show that he was deprived of a fair trial in light of " 'the entire argument before the jury....' " United States v. Wilkinson, 754 F.2d 1427, 1435 (2d Cir.), cert. denied, 472 U.S. 1019 (1985) (citation omitted).

Taken in light of the entire argument before the jury, it is not evident that Bilzerian failed to receive a fair trial based on the government's opening statement. Indeed, the government went on to prove at trial that Bilzerian was guilty of making false statements to the government and was involved in a scheme to defraud the IRS. Because none of the government's comments approach the prejudice required to establish misconduct, counsel's failure to object during the government's opening remarks was not objectively unreasonable in light of prevailing norms.

Additionally, Bilzerian has not shown how the alleged misconduct prejudiced his defense. This Court doubts that the outcome of Bilzerian's trial would have been different if counsel had objected to the government's language in opening statement in light of the extensive evidence presented at the subsequent trial. Petitioner, therefore, has failed to establish his claim of ineffective assistance based on his attorney's failure to object to the government's opening argument.

ii. Bilzerian's Cross-Examination

Bilzerian next suggests that his counsel was ineffective for failing to object on prosecutorial misconduct grounds to a series of questions asked of petitioner during the government's re-cross-examination. The government apparently designed these questions to elicit testimony as to whether Bilzerian had ever falsely held himself out as an attorney to a state court judge. Although his counsel objected to this line of questioning as highly prejudicial, Bilzerian now argues that his counsel was ineffective for failing to object specifically on prosecutorial misconduct grounds.

Again, there is no evidence that the prosecution acted in such a way as to deprive Bilzerian of his right to a fair trial. First, the severity of the

alleged misconduct is minimal given that the government had a good faith basis for its decision to pursue this topic in light of an affidavit of a Florida state court judge. Further, Bilzerian has not shown a likelihood that the outcome of his trial would have been different had counsel objected on prosecutorial misconduct grounds. Indeed, counsel vigorously objected to this line of questioning during re-cross-examination and even attempted to have the testimony stricken. Because these questions did not so infect the proceedings as to deny Bilzerian a fair trial, his attorney was not ineffective in failing to raise a prosecutorial misconduct objection during re-cross-examination, and petitioner's claim therefore is without merit.

iii. Presentence Report

As further evidence of his attorney's ineffectiveness, Bilzerian points to statements by the government included in the presentence report to which his counsel failed to object on prosecutorial misconduct grounds. The statements at issue are contained in the section of the report entitled "Prosecution's Version" which was compiled by the probation officer in charge of Bilzerian's case based on interviews with Assistant United States Attorney David Brodsky and case agents. As an initial matter, errors in a presentence report cannot amount to prosecutorial misconduct because such reports are compiled by the probation department and not the prosecuting attorneys. Additionally, statements found in a presentence report could not constitute prosecutorial misconduct in that they do not affect the fairness of a trial. Such reports are developed after trial and are intended for use only at sentencing proceedings.

Even if, however, counsel was unreasonable in not objecting to the inclusion of certain statements in the report, Strickland nevertheless requires Bilzerian to establish that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). The contents of a presentence report, by their very nature, have no bearing on the outcome of a criminal trial. Further, Bilzerian has failed to offer any evidence of the report's prejudicial effect on his sentence. Petitioner's claim of ineffective assistance on this ground, therefore, is baseless.

iv. Government's Misrepresentations

As a fourth ground for his claim of ineffective assistance based on his counsel's failure to object to alleged instances of prosecutorial misconduct, Bilzerian claims that his attorney erred in failing to object to a representation made by the government at the conclusion of petitioner's direct testimony. The representation arose out of an incident wherein this Court interrupted defendant and instructed him to avoid narrative responses. At the conclusion of petitioner's direct examination, counsel objected to this Court's behavior as prejudicial and moved for a mistrial. In opposing the motion, the prosecution was called upon to characterize this Court's actions on the record. Bilzerian now alleges that the government's version of the events placed on the record was so misleading as to rise to the level of misconduct such that his attorney was ineffective for failing to object to the statements.

Again, Bilzerian offers no evidence that this incident deprived him of a fair trial. Not only did his counsel argue forcefully for a mistrial, but this Court, after denying the motion, offered a curative instruction to the jury. That counsel did not further object to the government's statements on grounds of prosecutorial misconduct hardly constitutes unreasonable professional behavior. Additionally, Bilzerian has not demonstrated a reasonable likelihood of prejudice. As a result, counsel's failure to object on prosecutorial misconduct grounds cannot support petitioner's ineffective assistance claim.

v. Cross-examination of Witnesses

Finally, petitioner argues as ineffective his counsel's failure to object on prosecutorial misconduct grounds to certain guilt-assuming hypotheticals posed by the government during its cross-examination of Fred Bullard ("Bullard"), one of Bilzerian's character witnesses. At the time of trial, the law on cross- examination of non-expert character witnesses was not clear. Indeed, the Second Circuit did not address the propriety of such questions until well after the conclusion of Bilzerian's trial. See United States v. Oshatz, 912 F.2d 534 (2d Cir.1990), cert. denied, 500 U.S. 910 (1991). In Oshatz, that court held that, when examining a lay character witness, it is improper to pose hypothetical questions that assume a defendant's guilt. See id. Until Oshatz, however, the law in this area was unsettled.

Because the appropriateness of this type of questioning was unclear at the time, the government did not engage in misconduct by pursuing this line of inquiry nor was the fairness of the proceeding at risk. For this reason, counsel did not act unreasonably in failing to object to these questions on the grounds of prosecutorial misconduct. Further, petitioner's counsel did object to this inquiry on other grounds and was overruled. Finally, any possible prejudice to Bilzerian was mitigated when he took the stand and rebutted the issues raised in the government's hypothetical questions. As such, Bilzerian's claim of ineffective assistance of counsel based on his attorney's failure to object on prosecutorial misconduct grounds to questions that were plausibly proper when asked is without merit.

e. Failure to Object to Evidentiary Rulings

Bilzerian argues, as a fifth basis for his claim of ineffective assistance, that his counsel failed to object to the admission of certain evidence. In support of this contention, petitioner cites three instances where this Court allegedly admitted evidence improperly. First, petitioner argues that his counsel was ineffective for failing to object under Rules 403 and 404(b), Fed.R.Civ.P., to the admission of certain portions of his testimony given during a civil deposition. Petitioner likewise challenges his attorney's failure to object to the admission of testimony regarding the omission of four million dollars in income on his personal tax return. Finally, Bilzerian challenges as ineffective his attorney's failure to object to the admission of evidence concerning the fact that petitioner did not file timely tax returns from 1982-84.

In each of these cases, however, petitioner uses his § 2255 petition and memorandum of law in support thereof to reargue evidentiary rulings of this Court rather than to argue that his counsel was ineffective under the test set forth in Strickland. Indeed, Bilzerian neglects to offer evidence that his attorney either acted outside the scope of reasonable professional norms or that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of his trial would have been different. Rather, defendant argues at length the merits of the evidentiary rulings and then only conclusorily argues that his attorney was ineffective for failing to object. See Bilzerian Memo, at 65-84.

Petitioner may not recharacterize his challenges to the admission of

certain evidence, which at least with respect to the four million dollar tax error have been affirmed by the Second Circuit, as an ineffective assistance of counsel claim in an effort to relitigate these evidentiary issues. Because he has not made an appropriate argument under the test set forth in Strickland, his claim asserting ineffective assistance of counsel arising from the admission of certain evidence must fail.

f. Failure to Object to Expert Witness Testimony

As a sixth ground in support of his claim of ineffective assistance of counsel, Bilzerian argues that his attorney failed to object to testimony offered by the government's expert witness, Professor John Coffee ("Coffee"). Specifically, Bilzerian complains that Coffee improperly testified about the disclosure requirements of Schedule 13D. The propriety of Coffee's testimony, however, is a matter that was raised and decided on direct appeal. See United States v. Bilzerian, 926 F.2d 1285, 1294-95 (2d Cir.), cert. denied, 112 S.Ct. 63 (1991). As he has done above, petitioner now attempts to relitigate this issue by recasting it as a claim of ineffective assistance of counsel.

It is well settled in the Second Circuit that a petitioner may not use a § 2255 proceeding to relitigate issues that were raised and considered on direct appeal. See United States v. Jones, 918 F.2d 9, 10-11 (2d Cir.1990); Barton v. United States, 791 F.2d 265, 267 (2d Cir.1986); Giacalone v. United States, 739 F.2d 40, 42 (2d Cir.1984). Therefore, under the law of this case, the admission of Coffee's testimony was appropriate. See Bilzerian, 926 F.2d at 1294-95. For this reason, this Court will not entertain Bilzerian's instant claim.

g. Ineffectiveness at Sentencing

As his seventh and final basis for his claim of ineffective assistance of counsel, Bilzerian challenges his attorney's conduct at sentencing. Specifically, petitioner argues that his attorney acted unreasonably in failing to ask the Court to resolve pursuant to Rule 32(c)(1), Fed.R.Crim.P., the factual disputes raised by petitioner's objections to the presentence report.

With respect to the underlying argument that this Court erred at sen-

tencing, petitioner can rely on § 2255 only to correct a defect in sentencing which raises constitutional, jurisdictional, or other fundamental issues. See United States v. Addonizio, 442 U.S. 178, 185 (1979). As the government properly argues, an alleged error with respect to a sentencing matter typically does not rise to the level of a "fundamental defect which inherently results in a complete miscarriage of justice [or] omission inconsistent with the rudimentary demands of fair procedure...." Hill v. United States, 368 U.S. 424, 428 (1962). Indeed, a court can employ § 2255 only to remedy an error in sentencing "which inherently results in a complete miscarriage of justice." United States v. Wright, 524 F.2d 1100, 1101 (2d Cir.1975). That is not the case here.

As for the ineffective assistance of counsel claim upon which Bilzerian relies, petitioner necessarily cannot meet the prejudice prong of the two-part test set forth in Strickland. Unreasonable conduct on the part of an attorney at sentencing cannot affect the outcome of a trial. As such, Bilzerian cannot, and does not, show that there is a reasonable likelihood that the result of his trial would have been different. With respect to any potential prejudice that Bilzerian suggests he suffered in the sentence imposed, this Court indicated at sentencing that it would not rely on the presentence report. Rather, this Court stated its intent to rely on the evidence presented at trial and noted on the record that there was "nothing in the presentence report that would change my views in the direction of increasing the severity of the sentence." Sentencing Transcript, at 3-4. Because Bilzerian has failed to establish that he suffered prejudice either at trial or at sentencing, his claim of ineffective assistance of counsel must fail under the requirements of Strickland.

B. All Other Original § 2255 Claims

In addition to his ineffective assistance of counsel claim, Bilzerian raises four other grounds in support of his § 2255 motion. First, petitioner argues that this Court was biased against him and seeks an order vacating his conviction and sentence based on judicial misconduct. Next, Bilzerian argues that the jury instructions on reasonable doubt given by the Court were deficient. Third, Bilzerian challenges four of the counts of the indictment against him brought under 18 U.S.C. § 1001 as multiplicitous in that they were based on alleged misstatements found only in two filed docu-

ments. Finally, petitioner suggests that Counts 8 and 9, which alleged violations of 18 U.S.C. § 371, were improper since "[t]here is no offense under 18 U.S.C. § 371 for conspiracy to aid and abet a violation of another statute." Bilzerian Memo, at 114. Bilzerian failed to raise any of these four issues in his direct appeal to the Second Circuit and brings them for the first time in the instant motion.

It is well settled that a petitioner is barred from raising a claim in a § 2255 proceeding that was not litigated on direct appeal absent a showing of cause for the procedural default and actual prejudice resulting therefrom. See United States v. Frady, 456 U.S. 152, 167-68 (1982); Napoli v. United States, 32 F.3d 31, 36-37 (2d Cir.1994), cert. denied, 115 S.Ct. 900 (1995); Douglas v. United States, 13 F.3d 43, 46-47 (2d Cir.1993); Marone v. United States, 10 F.3d 65, 67 (2d Cir.1993); Campino v. United States, 968 F.2d 187, 189 (2d Cir.1992). Indeed, a petitioner may not use a § 2255 proceeding as a substitute for direct appeal. See United States v. Frady, 456 U.S. 152, 165 (1982).

As the Supreme Court has noted, "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." Frady, 456 U.S. at 166. In order to overcome the failure to raise a matter on direct appeal, therefore, Bilzerian must meet the two-part "cause and prejudice" test adopted by the Second Circuit in Campino. See Campino, 968 F.2d at 189; see also Marone, 10 F.3d at 67. Under this formulation, cause must be "something external to the petitioner, something that cannot be fairly attributed to him." Marone, 10 F.3d at 67. Additionally, Bilzerian may not establish cause based on his attorney's ignorance or inadvertence but, rather, must bear the risk of counsel's error. See id.

There is no suggestion that Bilzerian, who was represented by competent counsel both at trial and on appeal, was unaware of the claims upon which he now relies at the time he filed his appeal to the Second Circuit. Indeed, at least with respect to his claim of judicial misconduct, petitioner raised his objections at trial. Petitioner failed, however, to bring any of these arguments to the Court of Appeals. Further, Bilzerian now fails to provide this Court with any reason for his default. Indeed, in his Memorandum of Law, petitioner fails even to address the "cause and prej-

udice" standard. He is now, therefore, barred from raising his claims of judicial misconduct, deficient jury instructions, multiplicitous charges, and improperly charged conspiracy counts in the instant § 2255 motion. No cause for the procedural default having been shown, this Court declines to address whether Bilzerian suffered actual prejudice resulting therefrom.

C. Gaudin Claim

This Court now turns to whether Bilzerian asserts a valid claim under United States v. Gaudin, 115 S.Ct. 2310 (1995), given that the Supreme Court rendered its decision in that case well after his conviction became final. In Gaudin, the Court was asked to decide whether the element of materiality in a charge arising out of 18 U.S.C. § 1001 was a question for a court to decide or for a jury to decide. See id. at 2313. Section 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly or wilfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

A jury convicted Bilzerian of violating this statute.

In Gaudin, the parties agreed that the government is required to prove, as an element of the offense, that the misleading statements were material to the government inquiry. The issue before the Court was whether the judge or the jury should determine whether that element had been proven. After careful analysis, the Court held that

> [t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statements infringed on that right.

Gaudin, 115 S.Ct. at 2320. Bilzerian now attacks his conviction and sentence on the ground that, under Gaudin, this Court erred in refusing to

submit the issue of materiality to the jury.

This Court, therefore, must now decide whether the holding in Gaudin should be applied retroactively to Bilzerian's claim. It is well established that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague v. Lane, 489 U.S. 288, 310 (1989); see also Penry v. Lynaugh, 492 U.S. 302, 314 (1989). While new rules are always applied on direct review, this holding is intended to safeguard the principle of finality in criminal prosecutions. See Teague, 489 U.S. at 309. A new rule is one that "breaks new ground or imposes a new obligation on the States or the Federal Government." Id. at 301. According to the Court, therefore, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id.

The holding in Teague protects convictions from collateral review based on new rules of law except in two narrow circumstances. See Teague, 489 U.S. at 311. Thus, once a change in law is considered a new rule for retroactivity purposes, courts may only apply it retroactively "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe' " or if it is a "watershed rule [ ] of criminal procedure." Id. at 311. The first exception is self- evident. The second, however, is slightly more elusive. The Supreme Court has established two criteria for determining whether a new rule falls within this exception. First, it must be a rule that is "aimed at improving the accuracy of trial" and, second, it must be a rule which " ' "alter[s] our understanding of the bedrock procedural elements" essential to the fairness of a proceeding.' " Sawyer v. Smith, 497 U.S. 227, 242 (1990) (quoting Teague, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 693 (1971))).

Here, Bilzerian's conviction became final in 1991 when the Second Circuit affirmed his conviction and the Supreme Court denied certiorari. See United States v. Bilzerian, 926 F.2d 1285 (2d Cir.), cert. denied, 502 U.S. 813 (1991). The Supreme Court decided Gaudin approximately four years later. See United States v. Gaudin, 115 S.Ct. 2310 (1995). Bilzerian's § 2255 petition asserting a claim under Gaudin, filed August 11, 1995, therefore implicates the retroactivity rulings set forth in Teague.

As an initial matter, the holding in Gaudin is clearly a new rule for retroactivity purposes. Indeed, that materiality is a matter to be decided by the jury was a ruling of the Supreme Court that was "contrary to the case law of every federal circuit which had addressed the question before June 1995." United States v. Holland, 919 F.Supp. 431, 434 (N.D.Ga.), aff'd, 85 F.3d 643 (11th Cir.1996). As a result, the holding in Gaudin clarified an unsettled area of law and, as such, can only be applied retroactively to collaterally attack a conviction if the case falls within one of the two exceptions set forth in Teague. Here, the Gaudin rule does not place any "individual conduct beyond the power of the criminal law-making authority to proscribe." Teague, 489 U.S. at 311. Nor is Gaudin a "watershed rule [ ] of criminal procedure" as defined by the Supreme Court. Id. Indeed, the decision to make materiality a jury question does not approach the type of holding implicated by the second Teague exception which is reserved for only a small number of extraordinary cases.

Because Gaudin announces a new rule which does not fall within either of the exceptions enunciated in Teague, this Court cannot retroactively apply its holding to Bilzerian's claim. At least one other court which faced this issue has likewise held that Teague bars the retroactive application of Gaudin in a § 2255 proceeding and this Court has found no other precedent to the contrary. See Holland, 919 F.Supp. at 435. Petitioner thus cannot rely on Gaudin to collaterally attack his conviction and sentence and his § 2255 petition must, therefore, fail on this ground.

III. Motion for Partial Summary Judgment

On July 10, 1996, Bilzerian filed what he deemed to be a motion for partial summary judgment asking this Court to vacate his conviction. In that motion, petitioner argues that his conviction on certain counts of the indictment should be vacated in light of the Supreme Court's ruling in United States v. Gaudin, 115 S.Ct. 2310 (1995), and the Second Circuit's subsequent holding in United States v. Ali, 68 F.3d 1468 (2d Cir.1995). This is the exact substantive argument relied upon by Bilzerian in his motion for leave to amend or supplement his already filed § 2255 petition to add the Gaudin claim. Because this submission seeks the same relief and relies upon the same ground as petitioner's earlier motion, this Court will treat it as a successive § 2255 petition.

Rule 9(b) of the Rules Governing Section 2255 Proceedings empowers the Court to dismiss a successive § 2255 motion. That Rule provides:

A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

This Court has already allowed Bilzerian to amend his § 2255 petition to add the Gaudin claim, which was thoroughly briefed by the parties, and has fully addressed the merits of that claim in the instant opinion. Additionally, petitioner's subsequent motion for partial summary judgment fails to allege any new or different grounds for relief. To entertain the pending motion would, therefore, be duplicative and a waste of judicial resources. For the foregoing reasons, Bilzerian's motion for partial summary judgment is denied.

IV. Motion for Discovery

Because this Court has determined to dismiss Bilzerian's § 2255 petition and to deny his motion for partial summary judgment, his motion for an order granting him discovery is hereby denied as moot.

CONCLUSION

For the foregoing reasons, petitioner's motion for leave to amend his § 2255 petition to include a claim under United States v. Gaudin, 115 S.Ct. 2310 (1995), is granted and the Court hereby deems his pending § 2255 petition as amended to include the additional ground for relief. Petitioner's underlying § 2255 motion, as amended, is in all respects denied and the petition is dismissed. Likewise, Bilzerian's recent motion for partial summary judgment is denied. Finally, Bilzerian's motion for discovery is denied as moot.

It is so ordered.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * * * * * *

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense.

* * * * * * * * * * *

18 U.S.C. § 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly or wilfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.